No. 15369

In the United States Court of Appeals for the Ninth Circuit

UTILITY APPLIANCE CORPORATION, A CORPORATION,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The opinion of the Tax Court (R. 23–36) is reported at 26 T. C. 366.

JURISDICTION

This petition for review involves a proceeding instituted before the Tax Court by the petitioner, Utility Appliance Corporation (hereinafter referred to as "taxpayer"), with respect to excess profits tax liability for the year 1944. (R. 5–16.)

The taxpayer is a California corporation, and filed its returns for the periods herein involved with the Collector for the Sixth District of California. (R. 24.)

By letter dated October 8, 1952 (R. 12–16), the Commissioner of Internal Revenue notified the tax-

payer that the determination of its excess profits liability[1] for the taxable years 1940 through 1944 resulted in certain over-assessments, as set forth in an accompanying statement (R. 14–16), and further advised the taxpayer that its applications for relief under Section 722 of the Internal Revenue Code of 1939[2] with respect to those taxable years had been allowed in part (as set forth in detail in the letter and accompanying statement). Further (R. 13), the letter gave notice to the taxpayer of the disallowance in part of its applications for relief and related claims for refunds for the years in question, pursuant to Section 732 of the Code.

From that notice, the taxpayer, within less than ninety days thereafter, namely, on December 12, 1952 (R. 3), filed its petition (R. 5–16) with the Tax Court under the provisions of Section 272 of the Code for a redetermination, with respect only to the year 1944, as to the Commissioner's partial rejection of the application for relief under Section 722 (R. 5, 6).

After submission of the cause,[3] the Tax Court entered its decision (R. 36–37) on July 26, 1956.

Within less than three months thereafter, namely, on October 19, 1956 (R. 4), the taxpayer filed a petition for review (R. 37–41) by this Court, purportedly pursuant to Section 1142 of the 1939 Code as con-

[1] The letter and accompanying statement also advised the taxpayer as to the determination with respect to its income tax liability (R. 12, 15)—which is not material in this proceeding.

[2] All Code references herein will be to the 1939 Internal Revenue Code, unless otherwise indicated.

[3] In the Tax Court, the cause was submitted pursuant to its Rule 30 (R. 4, 24)—which permits the submission of causes without trial or hearing where the facts are uncontested.

tinued in effect by Section 7851 (b) of the Internal Revenue Code of 1954 (R. 37–38).[4]

QUESTION PRESENTED

Whether the Tax Court was correct in holding, sustaining the action of the Commissioner, that in the computation of its excess profits tax liability for the year 1944 the taxpayer was not entitled to the benefit of an unused excess profits credit carry-back from the year 1945 based upon a constructive average base period net income under Section 722 of the 1939 Internal Revenue Code, where such carry-back was not claimed in a timely application or claim filed by the taxpayer pursuant to the requirements of Section 722 (d) and of the applicable Regulations.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the statute and Regulations involved are set forth in the Appendix, *infra*.

STATEMENT

From the Commissioner's action (R. 12–16) with respect to the taxpayer's income and excess profits tax liabilities for the taxable years 1940 through 1944, the taxpayer instituted (R. 5–12) the present proceeding in the Tax Court to seek only (R. 6) a redetermination of its excess profits tax liability as to the year 1944 (R. 6, 24).

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[4] While we are not directly challenging the jurisdiction of this Court to review, we do not intend to concede that this Court has jurisdiction to review the decision of the Tax Court here, since, as hereinafter indicated, there might be a serious doubt as to that—in view of the prohibition contained in Section 732 (c) of the 1939 Code.

The parties, by their stipulation, finally submitted to the Tax Court for decision only the issue (R. 24) as to whether the taxpayer "has a timely claim" for an unused excess profits credit arising from the use of a constructive average base period net income for carry-back purposes, so that a constructive average base period net income for the year 1945 may be employed for the purpose of computing the unused excess profits credit carry-back from 1945 to 1944. The parties further stipulated (R. 24) the amount ($65,000) of constructive average base period net income for 1945 which is to be used in the event it is held that the constructive average base period net income for 1945 may be employed in the computation of an unused excess profits credit carry-back from 1945 to 1944.

The material facts, as recited by the Tax Court in its opinion, are as follows (R. 24–32):

The taxpayer is a corporation organized under the laws of the State of California. It filed its returns for the periods here involved with the Collector for the sixth district of California. (R. 24.)

The taxpayer had no excess profits net income for the year 1945, but had a deficit in such net income. Its excess profits credit for that year, computed without regard to Section 722, was $43,435.34 as computed under Section 713, and $55,180.66 as computed under Section 714. (R. 24.)

In the deficiency notice the Commissioner allowed an unused excess profits credit adjustment for the year 1944 in the amount of $10,884.69. That amount was computed without regard to Section 722, as follows (R. 24–25):

Unused excess profits credit for 1945	$55,180.66
Portion thereof first applied to 1943	44,295.97
Balance being unused excess profits credit carry-back to 1944	10,884.69

The foregoing computation appears in a revenue agent's report dated June 10, 1947. The correct amount to be first applied to 1943, as agreed by the Commissioner before the Tax Court, is $11,162.99 instead of the amount of $44,295.97. (R. 25.)

The Commissioner allowed to the taxpayer under Section 722 (b) (4), a constructive average base period net income of $39,000 for the year 1940, and $65,000 for each of the years 1941, 1942 and 1944. The Commissioner before the Tax Court also agreed to the employment of a like constructive average base period net income, $65,000, for the year 1943. The amount of $11,162.99, stipulated as the amount of excess profits credit carry-back from 1945 to be applied first to the year 1943, is computed as follows (R. 25–26):

Excess profits net income, 1943 per return	$98,170.66
Adjustments per revenue agent's report:	
Add: Declared value excess-profits tax overassessment	3,841.03
Total	102,011.69
Deduct: net income adjustment	29,098.70
Excess profits net income, 1943, as so adjusted	72,912.99
Deduct: 95% of $65,000, constructive average base period net income for 1943	61,750.00

Balance, being amount of unused excess profits credit for 1945 to be applied first to 1943 (whether the total amount of such credit for 1945 is computed with or without the use of a constructive average base period net income)	$11,162.99

The taxpayer filed its excess profits tax return for the year 1944 on May 15, 1945, pursuant to extension granted by the Commissioner to such date. The following payments of tax were made by the taxpayer on the dates indicated for excess profits tax liability for the year 1944 (R. 26–27):

Original Paid:			
3/15/45		$36,649.00	
5/15/45		6,497.03	
6/15/45		43,081.70	
9/17/45		43,081.70	
12/17/45		43,081.70	
Total		172,391.13	
Less: Interest		64.33	
Tax paid			$172,326.80
Additional Paid:			
10/11/48		$9,534.36	
11/10/48		11,054.18	
1/25/49		7,500.00	
2/14/49		7,794.84	
Total		35,883.38	
Less: Interest	$2,462.58		
Interest	1,762.12	4,224.70	
Tax paid			31,658.68
Total tax paid			203,985.48
Less: Allowance on tentative carry-back claim 11/25/46			20,678.27
			183,307.21

On May 15, 1945, the taxpayer filed an application on Form 991, for excess profits tax relief for the year 1944. This application asked for a reduction in excess profits tax under Section 722 in the amount of $90,153.56, from $221,224.89 to $131,071.33, computed in each case prior to the 10% credit for debt retirement. The application claimed a constructive average base period net income of $161,058.71, computed under Section 722 (b) (4). Details in support of the constructive average base period net income as claimed were incorporated in the application by reference from statements attached to Form 991 filed by the taxpayer for the year 1942. Nothing in the form required a schedule showing how the reduced tax claimed of $131,071.33 was computed, and no such schedule was attached. (R. 27.)

The reduced tax claimed of $131,071.33 was computed in conformance with Sections 710 and 711 of the Internal Revenue Code of 1939, as follows (R. 28):

Excess profits net income (income credit method)			$300,975.60
Specific Exemption		$10,000.00	
Constructive average base period net income claimed on Form 991	$161,058.71		
Constructive excess profits credit based on constructive income is 95% of the claimed constructive average base period net income		153,005.77	163,005.77

Adjusted excess profits net income after application of Section 722 as claimed----------	$137,969.83
Excess profits tax at rate of 95%-----	131,071.33

The amount of excess profits tax paid by the taxpayer at or prior to the filing of its claim for relief for 1944 on Form 991, that is, at or prior to May 15, 1945, was $43,081.70, and that amount was shown on Form 991 as the amount of refund or credit for which the application was a claim. Subsequently, on February 28, 1949, the taxpayer filed a claim on Form 843 to supplement the Form 991 and claimed a total refund of $79,446.59. The claim filed on Form 843 comprehended a constructive average base period net income for 1944 of $161,058.71, without claiming any carry-back of unused excess profits credit from 1945 based on a constructive average base period net income. (R. 28.)

Both the application filed by the taxpayer on Form 991 on May 15, 1945, for the year 1944, and the claim filed on Form 843 on February 28, 1949, for such year, comprehended a constructive average base period net income for 1944 of $161,058.71, without claiming any carry-back of unused excess profits credit from 1945 computed either with or without regard to Section 722. (R. 28–29.)

No agreement was entered into by the taxpayer and the Commissioner which would extend the statute of limitation for the year 1944 or 1945. (R. 29.)

On December 3, 1948, the Internal Revenue agent in charge at Los Angeles wrote to the taxpayer *inter alia,* as follows (R. 29–30):

> Reference is made to your claims for excess profits tax relief under section 722 of the Internal Revenue Code, filed for the years ended December 31, 1940, 1941, 1942, 1943, and 1944.
>
> In connection with these claims, it may be noted that the general average base period net income is $29,836.74, whereas under the growth formula, provided in section 713 (f) of the Code, you are entitled to use $45,168.23, excess profits net income for the year 1939 which is the highest income in base period years. Also, that excess profits tax paid for the year 1943 was refunded, due to a net operating loss and unused excess profits credit carry-back from 1945, and that in 1944 the 80% tax limitation is applicable.
>
> The claims for relief have been carefully reviewed on the basis of information submitted in connection with the claims, and there appears to be no possibility of a constructive average base period net income which would overcome the growth formula and the 80% limitation, in 1944, and result in the allowance of any relief.

As stated in this letter of December 3, 1948, an unused excess profits credit carry-back from 1945 to 1944 had already been allowed by the Commissioner, on the basis of issues other than Section 722. (R. 30.)

On May 7, 1951, the taxpayer, by its attorney, mailed a letter to the Excess Profits Tax Council, as follows (R. 30–31):

> It appears from the record that the applications filed in this proceeding cover only the years 1940–1944, inclusive. Since there was no tax for 1945 no claim was filed for that year.
>
> We should like to ask now that a constructive average base period net income be determined for 1945 for such application in respect of taxes for years prior to 1945 as the taxpayer may be entitled to upon the record.
>
> I believe that such a determination should be made as a matter of course because of the carry-back to 1943 and 1944. See revenue agent's reports respecting standard issues. The carry-back has also been a matter of discussion in conferences with the office of the Internal Revenue Agent in Charge and with the Technical Staff. See letter dated December 3, 1948, from the Internal Revenue Agent in Charge to the taxpayer.
>
> This request is made, nevertheless, for the purpose of making it an express part of the record.

On May 8, 1951, the Excess Profits Tax Council acknowledged receipt of this letter and replied to it as follows (R. 31):

> Receipt is acknowledged of your letter of May 7, 1951, concerning subject applications for section 722 relief. It is noted that this letter requests a determination of constructive average base period net income for 1945.

On the date of this letter, May 7, 1951, the applications for relief involved in this proceeding were pending on the merits before the Excess Profits Tax Council. Several conferences and considerable correspondence with the office of the Commissioner re-

lating to the merits of the case occurred after such date and before the Commissioner's final determination. A settlement of the amount of the constructive average base period net income for all taxable years, including 1945, was agreed to by the taxpayer on July 2, 1952, and the Commissioner's determination of this constructive average base period net income was made on September 19, 1952. (R. 31.)

On January 20, 1954, the taxpayer filed on Form 843 an "Amendment of Claim" relating to its claim for refund of excess profits tax for the year 1944 "solely for the purpose of making formal the claims previously presented requesting use in computing the unused excess profits credit adjustment for 1944, of a constructive average base period net income determined under section 722 for 1943 and 1945. * * *" (R. 31–32.)

The Commissioner, in his determination (R. 12–16), refused to allow the taxpayer the benefit of an unused excess profits credit carry-back based upon a constructive average base period net income under Section 722 from the year 1945 to the year 1944, in determining the taxpayer's excess profits tax liability for the year 1944 (R. 15–16). In his letter, in which he gave formal notice with respect to his partial allowance and partial disallowance of the taxpayer's applications for relief under Section 722 with respect to the taxable years 1940 through 1944, and also gave formal notice of his determination of the excess profits tax liabilities (and income tax liabilities) for those years, the Commissioner (in an accompanying statement) advised (R. 15–16) the taxpayer that a constructive

average base period net income in the amount of $65,000 for the year 1945[5] had been determined "for the purpose only of computing unused excess profits credit * * * carry-back to the extent applicable"—but at the same time he specifically informed the taxpayer that he was holding (R. 16) "that no timely claim for refund has been filed for the purpose of using the constructive average base period net income in the computation of the unused excess profits credit * * * carry-back."

The Tax Court, by an opinion which was reviewed by its "Special Division"[6] (R. 36), upheld the action of the Commissioner with respect to his denial of the unused excess profits credit carry-back from 1945 to 1944 based upon a constructive average base period net income under Section 722 (R. 24–36).

A review of the matter thus presented is sought by the taxpayer before this Court.

SUMMARY OF ARGUMENT

The Tax Court was clearly correct in upholding the Commissioner's refusal to allow the taxpayer, in the determination of its excess profits tax liability for

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[5] In that accompanying statement, the Commissioner also referred to the determination of a constructive average base period net income for 1943 for carry-over purposes (R. 15–16)—a matter no longer material, in view of the Commissioner's concession with respect thereto before the Tax Court (see R. 25–26).

[6] That was in accordance with Section 732 (d) of the Code, which provides that the determination of any Division of the Tax Court on any question arising under Section 722 shall be reviewed by the Special Division of the Tax Court. See, in this connection, *Helms Bakeries* v. *Commissioner*, 236 F. 2d 3 (C. A. 9th).

1944, the benefit of an unused excess profits credit carry-back from 1945 to 1944 based upon relief under Section 722.

The statute, in Section 722 (d), expressly requires that, in order to obtain the benefit of relief under Section 722, a taxpayer must file an application or claim therefor, within the time prescribed by Section 322, "in accordance with regulations prescribed by the Commissioner". The applicable Regulations promulgated pursuant to that express statutory authority unequivocally require, amongst other things, that in order to obtain the benefit of an unused excess profits credit carry-back based upon relief under Section 722, a taxpayer must specifically request such carry-back in an application, claim or amendment filed within the time prescribed by Section 322.

The validity of that requirement of the Regulations, promulgated pursuant to express Congressional authority, is beyond question. That requirement has been uniformly upheld and applied in all cases which have involved this problem.

In the instant case, since the taxpayer has admittedly failed to make any specific request for such carry-back, in any form, in any application, claim or amendment filed within the applicable time, as prescribed in Section 322 (b) (6)—*i. e.,* by March 15, 1949—the Commissioner and the Tax Court were clearly correct in denying the taxpayer the disputed carry-back.

The only occasions on which the taxpayer did make a specific request for the allowance of a carry-back of an unused excess profits credit from 1945 to 1944

based upon relief under Section 722 were in a letter to the Excess Profits Tax Council in 1951 and in its purported "Amendment of Claim" in 1954. Both were obviously too late, as both came long after the taxpayer's time had expired. Under the circumstances, both were clearly ineffective as original claims, because too late, and they were likewise wholly ineffective as purported amendments, since the earlier and timely application and claim, based on specific grounds, were under settled principles not susceptible to amendment by an untimely claim upon a new and different ground.

The taxpayer's assertion that there has been a waiver of the requirements of the Regulations by the Commissioner is wholly unfounded. The facts clearly established that the Commissioner has done nothing which could possibly be regarded as a waiver. On the contrary, this is clearly a case where the Commissioner has stood his ground and insisted upon full compliance with the Regulations.

Clearly, the decision of the Tax Court is correct and should be affirmed. There is, however, at least a serious doubt as to whether this Court has jurisdiction to review the decision of the Tax Court herein, in view of the prohibition contained in Section 732 (c) against appellate review of any question determined "solely by reason of" Section 722—and the Court may, therefore, wish to dismiss for lack of jurisdiction.

ARGUMENT

The Tax Court correctly decided that, in the computation of the taxpayer's excess profits tax liability for 1944, the taxpayer was not entitled to the benefit of an unused excess profits credit carry-back from the year 1945 based upon a constructive average base period net income under Section 722 of the Internal Revenue Code of 1939, where such carry-back was not claimed in a timely application or claim filed by the taxpayer pursuant to the requirements of Section 722 (d) of the Code and of the applicable regulations, Section 35.722-5 of Treasury Regulations 112

A. Preliminary

This is a case involving a tax under the so-called Second World War Excess Profits Tax Law, which was imposed under a new subchapter (Subchapter E—Excess Profits Tax) which was added to Chapter 2 of the 1939 Code by Section 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974, entitled "Excess Profits Tax Act of 1940," applicable to taxable years beginning after December 31, 1939, and repealed, as to taxable years beginning after December 31, 1945, by Section 122 (a) of the Revenue Act of 1945, c. 453, 59 Stat. 556.

In that new subchapter, a tax was imposed by Section 710 (a) (Appendix, *infra*) upon the "adjusted excess profits net income" as defined in Section 710 (b) (Appendix, *infra*), namely, the "excess profits net income" as defined in Section 711 (Appendix, *infra*) less the following: (1) A specific exemption (originally $5,000, later $10,000); (2) an excess profits credit computed under Section 712 (Appendix,

infra); and (3) an unused excess profits credit adjustment computed in accordance with Section 710 (c) (Appendix, *infra*). Section 711 provided that the excess profits net income shall be the normal tax net income (as defined in Section 13 (a) (2) under Chapter 1 of the Code, relating to the income tax), with certain adjustments. Under Section 712 (a) a corporation (if in existence prior to 1940) could take an excess profits credit computed either under Section 713 (Appendix, *infra*) on the basis of average net income during a so-called "base period," generally the years 1936 through 1939 (i. e., the ABPNI [7]), or under Section 714 upon the basis of invested capital, whichever resulted in the lesser tax. Sections 715 through 720 contained the formula upon which the invested capital credit was to be arrived at.

Then, under the new subchapter, after Section 720 came the sections dealing with "abnormalities" and special situations. Relief for "abnormalities" was accorded primarily by Section 721, which granted relief with respect to "abnormalities" in income in the taxable year (see *James F. Waters, Inc.* v. *Commissioner,* 160 F. 2d 596 (C. A. 9th), certiorari denied, 332 U. S. 767), and by Section 722 (Appendix, *infra*), which granted relief primarily with respect to "abnormalities" in the base period (see *Pohatcong Hosiery Mills* v. *Commissioner,* 162 F. 2d 146 (C. A.

[7] For the sake of brevity and to avoid possible confusion in terminology, the initials "ABPNI" have been generally used to refer to the "average base period net income" under Section 713, and the initials "CABPNI" have been used to refer to the "constructive average base period net income" under Section 722—and we will use those initials in this brief.

2d); *George Kemp Real Estate Co.* v. *Commissioner,* 182 F. 2d 847 (C. A. 2d), certiorari denied, 340 U. S. 852; and *Commissioner* v. *Smith Paper,* 222 F. 2d 126 (C. A. 1st)). In addition, some further relief with respect to "abnormalities" was provided for under Section 711 (b) (1) (H), (I), (J), and (K), by way of adjustments to a taxpayer's base period income, for unusual or "abnormal" deductions, etc., under certain specified and limited conditions, for the purpose of the computation of the excess profits credit based on income. See *Colorado Milling & El. Co.* v. *Commissioner,* 205 F. 2d 551 (C. A. 10th), and *Packer Pub. Co.* v. *Commissioner,* 211 F. 2d 612 (C. A. 8th). See also Section 732 (a) of the Internal Revenue Code of 1939 (Appendix, *infra*), and Section 35.732–1 of Treasury Regulations 112, as amended by T. D. 5474, 1945 Cum. Bull. 280.

That excess profits tax law has been characterized as one by which "Congress sought to obtain * * * funds from abnormally high corporate profits," to meet the needs of the Government in a period of "national emergency." *United States* v. *Koppers Co.,* 348 U. S. 254, 261. Viewing the law broadly, and overlooking numerous complications not here material, it is apparent that the law taxed at high rates all profits above a certain level, which was called the excess profits credit and which was computed either upon the basis of average income for a specified prior period (called the base period, generally the years 1936 through 1939) or upon the basis of invested capital, whichever resulted in the lesser tax—except that the law contained provisions granting re-

lief from the resultant tax for certain so-called "abnormalities," primarily by Sections 721 and 722, and to some further extent under certain parts of Section 711 (b) (1), and the law also contained various other provisions dealing with special situations.

The principal so-called "abnormalities" provisions of the Second World War Excess Profits Tax Law (Section 721 and Section 722) were originally added to the Code by the Second Revenue Act of 1940, but they underwent considerable major changes in subsequent Acts, being largely amplified by the Excess Profits Tax Amendments of 1941, c. 10, 55 Stat. 17, and by the Revenue Act of 1942, c. 619, 56 Stat. 798, with further occasional changes being made even thereafter. Section 722, with respect to its *relief* provisions, was finally changed (retroactively, to apply to all taxable years after 1939) by Section 222 of the Revenue Act of 1942, so as to provide, in substance, that a taxpayer could under certain conditions obtain relief upon the basis of a "constructive" average base period net income (i. e., a "CABPNI") if it could establish that its income during the base period was not normal for any of the reasons specified in the statute and if it could establish "what would be a fair and just amount representing normal earnings." With respect to the *procedure* for obtaining relief, Section 722 was finally amended by the Act of December 17, 1943, c. 346, 57 Stat. 601 (also retroactively to apply to all taxable years after 1939), so as to require, in substance, that a taxpayer must first pay its excess profits tax without the benefit of Section 722 and then seek relief under Section 722 by filing

a claim therefor pursuant to the provisions of Section 322 of the Code (Appendix, *infra*), the so-called "claim for refund" section, "in accordance with regulations prescribed by the Commissioner with the approval of the Secretary." Section 722 (d) of the Code. See also *Pohatcong Hosiery Mills* v. *Commissioner, supra; United States* v. *Koppers Co., supra; May Seed & Nursery Co.* v. *Commissioner,* 242 F. 2d 151 (C. A. 8th).[8]

At the same time that Congress undertook the first major amplification of the two principal "abnormalities" sections (Sections 721 and 722) and added Section 711 (b) (1) (J) and (K) in the Excess Profits Tax Amendments of 1941, it also added to the law Section 732 (a), (b), and (c) (Appendix, *infra*) to deal specifically with the review of "abnormalities" questions by the Tax Court (then called the Board of Tax Appeals) and to prohibit expressly the further review by any other court of any decision of the Tax Court on any of the "abnormalities" questions. By subsection (a) of Section 732, Congress provided for the review by the Tax Court of the disallowance by the Commissioner of a claim for refund upon the basis of the "abnormalities" provisions of the law, namely parts of Section 711 (b), and Section 721 and Section 722.[9] By subsection (b) of Section 732, Con-

[8] There was a provision, in Section 710 (a) (5), for the deferral of the payment of a portion of the tax where Section 722 relief was sought, but that is not material here and may be ignored for present purposes.

[9] Theretofore, the jurisdiction of the Tax Court could be invoked only where the Commissioner had determined a deficiency, pursuant to Section 272 of the Code.

gress authorized the Tax Court to determine a deficiency with respect to any taxable year brought to it upon a disallowance of a claim for refund in accordance with subsection (a). See *Commissioner* v. *Blue Diamond Coal Co.,* 230 F. 2d 312 (C. A. 6th); *Commissioner* v. *Pittsburgh & Weirton B. Co.,* 219 F. 2d 259 (C. A. 4th); *Commissioner* v. *S. Frieder & Sons Co.,* 228 F. 2d 478 (C. A. 3d); *Commissioner* v. *Seminole Mfg. Co.,* 233 F. 2d 395 (C. A. 5th.) By subsection (c) of Section 732, Congress limited the review of those "abnormalities" questions to the Tax Court, expressly prohibiting any further review by any other court or agency of the decision of the Tax Court on any of those "abnormalities" questions. The intent of Congress to so limit the review of "abnormalities questions" was made unmistakably clear by its Committee Reports. H. Rep. No. 146, 77th Cong., 1st Sess., pp. 14–15 (1941–1 Cum. Bull. 550, 560–561), and S. Rep. No. 75, 77th Cong., 1st Sess., pp. 15–16 (1941–1 Cum. Bull. 564).

Subsequently, by Section 222 (c) of the Revenue Act of 1942, Congress added subsection (d) to Section 732 of the Code (Appendix, *infra*) to provide for the review by a "Special Division" of the Tax Court of the decisions by any division of the Tax Court of questions under Section 721 (a) (2) (C) or Section 722 of the Code. This new feature was written into the law by Congress because of its realization of the "complicated nature" of the problems and issues involved. See H. Rep. No. 2333, 77th Cong., 2d Sess., p. 149 (1942–2 Cum. Bull. 372, 482); S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 206–207 (1942–2 Cum.

Bull. 504, 655). In the new subsection (d) of Section 732, Congress further provided that the decisions on questions under Section 721 (a) (2) (C) or Section 722 by the newly created Special Division of the Tax Court shall be the decisions of the Tax Court and shall not be reviewable by the entire Tax Court.[10] See Section 35.732–1 of Treasury Regulations 112, as amended by T. D. 5474, 1945 Cum. Bull. 280; see also *Green Spring Dairy* v. *Commissioner,* 208 F. 2d 471 (C. A. 4th); *A. B. Frank Co.* v. *Commissioner,* 211 F. 2d 497 (C. A. 5th); *Helms Bakeries* v. *Commissioner,* 236 F. 2d 3 (C. A. 9th.)

Returning to the instant case, it might be observed at this point that the provision of the law which gave rise to the present controversy is the provision contained in Section 710 (b) (3), which permitted the making of an adjustment, in accordance with Section 710 (c), for "unused" excess profits credits in arriving at the income to be subjected to the excess profits tax. Originally, Section 710 (c), as it was first added to the Code by the Second Revenue Act of 1940, permitted only the carryover to a taxable year of any portion of the excess profits credit unused in the preceding year—i. e., permitted the carry-over from the preceding year to the taxable year of any portion of the excess profits credit for the prior year which was in excess of the excess profits net income of that prior year. By Section 2 of the Excess Profits Tax

[10] Nor, of course, are the decisions of such questions by the Special Division reviewable by any other court or agency, in view of the prohibition contained in Section 732 (c) of the Code.

Amendments of 1941, the provision was changed so as to allow the carry-over to the taxable year of unused credits to be made from the two preceding taxable years. After a minor change made by Section 202 (e) of the Revenue Act of 1941, the provision was drastically changed by Section 204 (a) and (b) of the Revenue Act of 1942, so as to permit adjustments to be made in the taxable year by way of carry-back of unused credits from the two subsequent taxable years, in addition to the carry-over of unused credits from the two preceding taxable years.

Upon a re-examination of the carry-back provisions in 1945, Congress by Section 5 of the Tax Adjustment Act of 1945 enacted provisions prescribing special periods of limitations for the allowance of refunds (or the assessment of resultant deficiencies) resulting from the application of carry-backs of unused excess profits credits (and of net operating losses). Congress did that because it realized that of necessity the facts or events giving rise to overpayments (or resultant deficiencies) in excess profits tax attributable to carry-backs of unused excess profits credits would not occur until long after the close of the taxable year, so as to make the existing normal limitations provisions inadequate. See H. Rep. No. 849, 79th Cong., 1st Sess., pp. 28–33 (1945 Cum. Bull. 566, 585–588), and S. Rep. No. 458, 79th Cong., 1st Sess., p. 3 (1945 Cum. Bull. 592, 593–594). The provisions prescribing the new limitations periods as to refunds, and resultant deficiencies, were enacted by Congress as retroactive changes to Section 322 and Section 276 under Chapter 1, the income tax chapter of the Code—

which by virtue of Section 729 (a) (Appendix, *infra*) were applicable to the excess profits tax law under Subchapter E of Chapter 2 of the Code. Still later, by Section 122 (e) and (f) of the Revenue Act of 1945, Congress further amended the pertinent limitations provisions applicable to carry-backs of unused excess profits credits, in order to coordinate them to the repeal of the excess profits tax law effective for taxable years beginning after 1945 by Section 122 (a) of the Revenue Act of 1945. See S. Rep. No. 655, 79th Cong., 1st Sess., pp. 30–32 (1945 Cum. Bull. 621, 645–646), and H. Conference Rep. No. 1165, 79th Cong., 1st Sess., p. 7 (1945 Cum. Bull. 654, 655).

The normal period of limitations for the filing of a claim for refund, under subsection (b) (1) of Section 322 (Appendix, *infra*), was two years from the payment of the tax or three years from the filing of the return, whichever expired later. The three-year period from the filing of the return was, of course, measured from the year of the claimed overpayment, so that in a case where a refund would be sought upon the basis of the carry-back of an unused excess profits credit, the three-year period for the filing of claims would run from the filing date of the return for the year to which the unused excess profits credit was sought to be applied.

In lieu of that period prescribed in subsection (b) (1), however, subsection (b) (6) of Section 322 (Appendix, *infra*) interposed a special provision applicable to refunds attributable to carry-backs and prescribed a longer period of limitations. It was, as simply but clearly indicated by its title, a provision

enacting a "Special period of limitation with respect to * * * unused excess profits credit carry-backs." As subsection (b) (6) was first added to the Code by Section 5 (b) of the Tax Adjustment Act of 1945, it prescribed, as a first alternative, a three-year period measured from the close of the taxable year giving rise to the unused excess profits credit. This was later changed, by the amendment made by Section 122 (e) (1) of the Revenue Act of 1945, so as to prescribe as the first alternative a period ending with the expiration of the fifteenth day of the thirty-ninth month following the end of the taxable year giving rise to the unused excess profits credit. As the second alternative, subsection (b) (6) prescribed a period of limitations equal to the period prescribed in Section 322 (b) (3) (Appendix, *infra*)—which, in substance, in the case where the Commissioner and the taxpayer had executed an agreement to extend the time for assessment, authorized the filing of a claim for refund within the period as extended by the agreement and for six months thereafter. See *Claremont Waste Mfg. Co.* v. *Commissioner,* 238 F 2d 741 (C. A. 1st). We might observe at this point that this second alternative under Section 322 (b) (6) does not apply in the instant case, since here there was no agreement (R. 29) entered into by the taxpayer and the Commissioner to extend the time for the year 1945—or for the year 1944.

B. The carry-back of an unused excess profits credit based upon relief under Section 722 must, as required by the Regulations, be specifically requested in a timely application for relief, claim or amendment thereto—and, since no such timely request was made here, the carry-back was properly denied

In this case, the Tax Court, upholding the action of the Commissioner, held that the taxpayer was not entitled to the benefit of an unused excess profits credit carry-back to the year 1944 from the year 1945 based upon a CABPNI under Section 722 for the year 1945, because the taxpayer had failed to claim such carry-back in any timely application for relief or claim for refund, or amendment thereto.

We submit that the holding of the Tax Court is unquestionably correct under the facts of this case, and must therefore be affirmed. Indeed, it may well be said here, we believe, that the taxpayer's eventual request, belatedly made, for the carry-back to 1944 of an unused excess profits credit from 1945 under Section 722 "was properly rejected by the Commissioner if it did not satisfy the conditions which Congress directly and through the rule-making power given to the Treasury laid down as a prerequisite for such refund." *Angelus Milling Co.* v. *Commissioner,* 325 U. S. 293, 295–296.

As already noted, the *procedural* provisions with respect to Section 722 relief were finally amended—by the Act of December 17, 1943, c. 346, 57 Stat. 601, retroactively so as to apply to all taxable years beginning after December 31, 1939—so as to provide

that a taxpayer must first pay its excess profits tax and then seek relief under Section 722 by way of a claim for refund, by an application therefor "in accordance with regulations prescribed by the Commissioner" (Section 722 (d)). In other words, the final mandate of Congress on this matter was that no relief should be allowed to a taxpayer under Section 722 except by way of refund and upon an application therefor made according to the Regulations to be prescribed by the Commissioner. As is readily apparent from the reports of the congressional committees heretofore referred to, Congress by that time was fully aware of the great complexities and difficulties involved in the subject matter of the relief granted under Section 722, and undoubtedly because of that chose to leave all administrative and procedural details to be worked out by the Commissioner by regulation. See *May Seed and Nursery Co.* v. *Commissioner,* 242 F. 2d 151 (C. A. 8th).

It is, we believe, readily understandable that Congress would leave to the Commissioner the details for the administration of a matter as complicated as Section 722. See *May Seed and Nursery Co.* v. *Commissioner, supra;* see also *Packer Pub. Co.* v. *Commissioner,* 211 F. 2d 612, 615 (C. A. 8th). Cf. *Angelus Milling Co.* v. *Commissioner, supra,* p. 296. And, it is settled, when Congress does leave details to be worked out by the Commissioner, the Regulations which are promulgated pursuant to such express legislative authority have the full force of law (*Security-First Nat. Bank of Los Angeles* v. *Welch,* 92 F. 2d 357, 395 (C. A. 9th), certiorari denied, 303 U. S. 638), and

should not be disregarded unless clearly contrary to the will of Congress (*Commissioner* v. *South Texas Co.,* 333 U. S. 496). See also *Angelus Milling Co.* v. *Commissioner, supra; May Seed and Nursery Co.* v. *Commissioner, supra.*

We believe that an examination of the pertinent provisions of the Regulations promulgated by the Commissioner, with the approval of the Secretary of the Treasury, leaves no room for any doubt as to the correct result in the instant case. It will be noted that Section 35.722–5 (a) of Treasury Regulations 112 (Appendix, *infra*) requires, in the first place, that in order to obtain the benefits of Section 722 a taxpayer must file an application on a designated form (Form 991) within the period prescribed by Section 322 for the filing of claims for refund, which application "must set forth in detail and under oath each ground under section 722 upon which the claim for relief is based, and facts sufficient to apprise the Commissioner of the exact basis thereof." That section further points out that it is "incumbent upon the taxpayer to prepare a true and complete claim and to substantiate it by clear and convincing evidence," and gives warning that a "failure to do so will result in the disallowance of the claim." The section also provides that no "new grounds" will be considered if presented by the taxpayer after the period prescribed by Section 322.

With particular reference to the allowance of unused excess profits credit carry-backs resulting from relief under Section 722, the Regulations, in the same section, specifically require that a taxpayer must,

within the time prescribed by Section 322, file an application (on Form 991) for the taxable year to which the unused excess profits credit carry-back is to be applied, which application "shall contain," in addition to all other information required, "a complete statement of the facts upon which it is based * * * and shall claim the benefit of the unused excess profits credit * * *" carry-back." The Regulations further provide, still in the same section, that if an application for relief for the particular year has already been filed, the taxpayer, in order to obtain the benefit of an unused excess profits credit carry-back based upon a CABPNI, should, within the time prescribed by Section 322, file an amendment to that application for the taxable year to which the unused excess profits credit carry-back is to be applied, specifically requesting such carry-back.

From a mere reading of the Regulations, it is readily apparent that the benefit of the carry-back of an unused excess profits credit resulting from a CABPNI under Section 722 must be specifically sought by a taxpayer in a timely application for relief, timely claim for refund, or timely amendment thereto. Indeed, that requirement is prescribed and outlined in detail by the Regulations with such care and particularity as to leave no room for any possible doubt about the matter.

Upon the basis of that requirement of the Regulations, all of the cases which have had occasion to consider this problem as to the allowance of an unused excess profits credit carry-back, or carry-over, resulting from the allowance of a CABPNI and the

grant of relief under Section 722, have denied the carry-back, or carry-over, where no timely claim was made specifically requesting such carry-back, or carry-over. *May Seed and Nursery Co.* v. *Commissioner, supra,* affirming 24 T. C. 1131. *Lockhart Creamery* v. *Commissioner,* 17 T. C. 1123, 1140–1143; *Barry-Wehmiller Machinery Co.* v. *Commissioner,* 20 T. C. 705; and *St. Louis Amusement Co.* v. *Commissioner,* 22 T. C. 522. Cf. *Packer Publishing Co.* v. *Commissioner,* 17 T. C. 882, 898, reversed on other issues, 211 F. 2d 612 (C. A. 8th), in which the carry-over of an unused constructive excess profits credit was allowed because a computation showing the use of the carry-over in the application was regarded (p. 898) by the Tax Court as constituting a sufficient statement of a claim for the carry-over.

All of the decisions of the Tax Court on this problem in the cases above-mentioned, and particularly in the *Lockhart Creamery, Barry-Wehmiller Machinery Co.,* and *St. Louis Amusement Co.* cases, constitute at least an implicit recognition of the validity and force of these provisions of the Regulations, which, as seen, were promulgated pursuant to express statutory authority. Further, the Eighth Circuit, in the *May Seed and Nursery Co.* case, has given express and emphatic approval to this provision of the Regulations requiring that a specific request for a carry-back, or carry-over, of an unused credit resulting from a CABPNI under Section 722 must be made in a timely application, claim, or amendment thereto.

Under the circumstances, and especially in view of the complicated nature of the subject matter in-

volved, it seems to us inconceivable that any court would hold these Regulations invalid. Because of the complexity of the problems and difficulties which could reasonably have been expected to arise in the administration of Section 722 relief, it would seem that there could be no serious challenge to the appropriateness of the Regulations promulgated by the Commissioner. See *May Seed and Nursery Co.* v. *Commissioner, supra,* at pp. 153–154. See also *Lockhart Creamery* v. *Commissioner, supra,* at p. 1141; *Angelus Milling Co.* v. *Commissioner, supra,* at p. 296; and *Blum Folding Paper Box Co.* v. *Commissioner,* 4 T. C. 795, 796–797, 799.

In the instant case, it is clear from the facts that the taxpayer has failed to make a *timely* application, claim or demand, in any form whatsoever, specifically requesting the carry-back of an unused excess profits credit from 1945 to 1944 based upon a CABPNI under Section 722, in compliance with the Regulations. In accordance with the first alternative of Section 322 (b) (6), applicable here, the period for claiming a refund of 1944 excess profits tax based upon a carry-back of an unused excess profits credit from 1945, expired on the fifteenth day of the thirty-ninth month after the close of the year 1945—i. e., it expired on March 15, 1949. That date fixed the time limit, therefore, within which the taxpayer should have made its demand—either in an application for relief, claim for refund, or amendment thereto—specifically requesting the allowance of a carry-back of an unused excess profits credit from 1945 to 1944 upon the basis of the grant of relief under Section 722 and the allowance of a CABPNI.

That was the unequivocal requirement of the Regulations and of the statute. But the taxpayer failed completely to comply with that requirement, as it filed no such claim or demand, *in any form,* before the expiration of the applicable period. Both the taxpayer's original application for relief (on Form 991), filed on May 15, 1945 (R. 27), and its claim for relief (on Form 843), filed on February 28, 1949 (R. 28–29), failed to assert any claim or demand whatsoever for any carry-back of an unused credit from 1945 to 1944—either upon the basis of Section 722 relief, or under the normal provisions of the law, i. e., before or without the benefit of any relief under Section 722 (R. 29.)

The first request which the taxpayer ever made for the carry-back of an unused excess profits credit from 1945 to 1944 upon the basis of a CABPNI under Section 722 came in the form of the letter which the taxpayer wrote to the Excess Profits Tax Council on May 7, 1951—which was obviously too late, since, as we have seen, its time had already expired on March 15, 1949. Likewise, the so-called "Amendment of Claim," which the taxpayer filed (on Form 843) on January 20, 1954 (R. 31–32), also came too late. Thus, the Tax Court was unquestionably correct in regarding both the 1951 letter and the 1954 so-called amendment as untimely and consequently ineffective. (R. 32–33.)

Not only were the 1951 letter and 1954 amendment ineffective as original claims, because filed too late, but they were also completely ineffective as amendments of the prior application and claim which had

been timely filed by the taxpayer for relief and refund on specific grounds under Section 722. It has long been settled that a timely claim for refund upon a specific ground, and for a definite amount, is not susceptible to amendment by an untimely claim upon a different and unrelated ground. *United States* v. *Andrews,* 302 U. S. 517, and *United States* v. *Garbett Oil Co.,* 302 U. S. 528.

Although the taxpayer at times asserts (Br. 10, 12, 14) that it has complied with the requirements of the Regulations, it does concede (Br. 10–11, 15–16) that it has not made a timely specific request for the allowance of a carry-back of unused excess profits credit from 1945 to 1944 based upon a CABPNI under Section 722. In an effort to escape the consequences of that concession, however, the taxpayer suggests (Br. 11, 15–16) that the Regulations do not require that a specific request for a carry-back based upon a CABPNI must be made. We submit that in that respect the taxpayer is completely in error, because it is unmistakably clear that the Regulations, as already brought out, do require that such a carry-back be specifically requested. See *May Seed and Nursery Co.* v. *Commissioner,* 242 F. 2d 151 (C. A. 8th).

In final analysis, however, the real substance of all of the taxpayer's contentions—including its reliance upon the fact that the Commissioner had granted a carry-back of an unused excess profits credit from 1945 to 1944 under the normal provisions of the law, and its reliance upon the 1951 letter and the 1954 so-called amendment—is premised upon nothing more than an assertion that the Commissioner

has somehow waived the requirements of the Regulations. In support of that assertion, the taxpayer makes a variety of arguments and cites numerous authorities. (Br. 18–23.) In view of the facts of this case, we deem it unnecessary to burden this Court with any detailed discussion thereof. We firmly believe that the taxpayer's basic assertion of a waiver in this case is wholly without merit. Clearly, this is not a case in which it could possibly be said that the Commissioner by his conduct might be regarded as having waived strict compliance with the Regulations. Cf. *Angelus Milling Co.* v. *Commissioner, supra,* at pp. 296–299. On the contrary, on the facts of this case, we believe that it may well be said here that this is a case where the Commissioner has stood his ground—where the Commissioner "insists upon full compliance" with the Regulations. See *May Seed and Nursery Co.* v. *Commissioner, supra,* at p. 155.

In the instant case, the Commissioner has never done anything which could possibly be regarded as a waiver of the requirement of the Regulations that a specific demand must be made for the carry-back of an unused excess profits credit based upon a CABPNI under Section 722. Contrary to the taxpayer's contention (Br. 7), no such waiver can be inferred from the action of the Commissioner in allowing the carry-back of an unused excess profits credit from 1945 to 1944 resulting under the normal provisions of the law. The making of an adjustment for the carry-back of an unused credit resulting under the normal provisions of the law, i. e.,

without the benefit of Section 722 relief, is clearly required under Section 710 (c) and, in fact, that adjustment is made automatically, whether or not claimed—that adjustment has even been characterized as mandatory. (See *May Seed and Nursery Co.* v. *Commissioner, supra.* Cf. Taxpayer's Br. 17.) As distinguished from the carry-back of an unused credit resulting under the normal provisions of the law, however, the carry-back involved in the instant case is the carry-back of an unused excess profits credit which arises and results solely and exclusively from the grant of relief under Section 722. As to this latter type of carry-back, we submit, the Regulations inescapably require that a specific demand therefor must be made by the taxpayer in a timely application, claim or amendment thereto. And, clearly, the Commissioner has never waived that requirement in this case.

Because of this difference between the two types of carry-backs, in that a specific demand must be made for the carry-back of an unused credit resulting from Section 722 relief, the fact that the Commissioner has allowed a carry-back of unused excess profits credit from 1945 to 1944 under the normal provisions of the law, as indicated, is wholly immaterial and of no significance whatever in the present controversy—and does not aid the taxpayer in its present contention before this Court for a carry-back of unused credit resulting from the grant of a CABPNI under Section 722. See *Lockhart Creamery* v. *Commissioner, supra; Barry-Wehmiller Machinery Co.* v. *Commissioner, supra;* and *St. Louis Amuse-*

ment Co. v. *Commissioner, supra.* Nor is the taxpayer's position here aided by such cases as the decision in the second *Kemp* case, *George Kemp Real Estate Co.* v. *Commissioner,* 205 F. 2d 236 (C. A. 2d), cited by the taxpayer (Br. 14), since such cases merely stand for the proposition that once a taxpayer has litigated, to a final decision in a prior case, its right to Section 722 relief, it will not be permitted to litigate again the same question for a later year, under the doctrine of collateral estoppel.

Nor is the taxpayer's position aided by the fact that a CABPNI under Section 722 has actually been allowed by the Commissioner for the year 1945. The allowance of a CABPNI for that year, and for 1943, was made specifically "for the purpose only of computing unused excess profits credit carry-over and carry-back to the extent applicable." (R. 15–16.) That action by the Commissioner cannot possibly be regarded as constituting a waiver of the requirement of the Regulations. *Wiener Machinery Co.* v. *Commissioner,* 16 T. C. 48, 52–53; *Barry-Wehmiller Machinery Co.* v. *Commissioner, supra,* at p. 714. And, it must be remembered, the Commissioner, in that same statement, which accompanied the ninety-day letter upon which the instant proceeding is based, advised the taxpayer specifically and unmistakably that he was holding that no timely claim had been made for a carry-back based on a CABPNI (R. 16), and he consequently denied the carry-back.

We might also point out that, contrary to the taxpayer's suggestion (Br. 9), the concession with respect to the year 1943 which the Commissioner made

before the Tax Court (R. 25–26) was *not* in any sense the equivalent of a consent to the use of an unused excess profits credit based upon a CABPNI under Section 722 for the purpose of arriving at the disputed carry-back to 1944. Actually, the Commissioner before the Tax Court consented to the use of a CABPNI for 1943 merely for the purpose of determining the amount of unused excess profits credit arising under the normal provisions of the law for the year 1945 which would be used up in the year 1943, and so as to thus arrive at the amount of unused remainder of that "normal" 1945 credit which would be available to be applied to the year 1944.

For the foregoing reasons, we firmly believe that the decision of the Tax Court in this case is correct and should be affirmed. We might, however, add one additional comment, and that is to point out that in the decision of this controversy it should be remembered that Section 722 is a provision granting special relief, and that such provisions are to be strictly construed against the one claiming rights or benefits thereunder. See *Helvering* v. *Inter-Mountain Life Insurance Co.,* 294 U. S. 686; *Helvering* v. *Northwest Steel Mills,* 311 U. S. 46; *Packer Pub. Co.* v. *Commissioner,* 211 F. 2d 612 (C. A. 8th).

The jurisdiction of this Court to review

As indicated at the beginning of this brief, we believe that there is a serious doubt as to this Court's jurisdiction to review the decision of the Tax Court herein, because of the prohibition against appellate review contained in Section 732 (c) of the Code. Un-

mistakably, Section 732 (c) prohibits any appellate review of any decision of the Tax Court of any question determined "solely by reason of * * * section 722"—or by reason of the other two so-called "abnormalities" provisions of the law, Section 721 or parts of Section 711 (b) (1).

That prohibition against review has been generally observed by the appellate courts, with respect to all three of the "abnormalities" sections. See *James F. Waters, Inc.* v. *Commissioner,* 160 F. 2d 596 (C. A. 9th), certiorari denied, 332 U. S. 767; *Colonial Amusement Co. of Philadelphia* v. *Commissioner,* 173 F. 2d 568 (C. A. 3d); *George Kemp Real Estate Co.* v. *Commissioner,* 182 F. 2d 847 (C. A. 2d), certiorari denied, 340 U. S. 852; *Colorado Milling & El. Co.* v. *Commissioner,* 205 F. 2d 551 (C. A. 10th); *A. B. Frank Co.* v. *Commissioner,* 211 F. 2d 497 (C. A. 5th); *Corn Products Refining Co.* v. *Commissioner,* 215 F. 2d 513 (C. A. 2d), certiorari denied on this point, 348 U. S. 911, affirmed on other issues, 350 U. S. 46, rehearing denied, 350 U. S. 943; also cf. *George Kemp Real Estate Co.* v. *Commissioner,* 205 F. 2d 236 (C. A. 2d); *Packer Pub. Co.* v. *Commissioner,* 211 F. 2d 612 (C. A. 8th); *Helms Bakeries* v. *Commissioner,* 236 F. 2d 3 (C. A. 9th); and *May Seed and Nursery Co.* v. *Commissioner,* 242 F. 2d 151 (C. A. 8th).

In the instant proceeding, there is substantial warrant for the view that the question decided by the Tax Court was one determined "solely by reason of" Section 722, and that hence appellate review is prohibited by Section 732 (c). The issue, in general, was one involving the requirement, prescribed by

Section 722 itself, of the filing of an application for relief under Section 722. Viewed more directly, the issue decided by the Tax Court was one as to the sufficiency of an application for relief under Section 722. Even more specifically, the issue was whether an unused excess profits credit carry-back under Section 722 may be allowed when not claimed by the taxpayer, as required by the Regulations under Section 722. When so viewed, the issue would appear to be one falling within the prohibition against appellate review contained in Section 732 (c).[11]

The taxpayer before this Court takes the position (Br. 2) that the Court has jurisdiction to review this case, notwithstanding the prohibition of Section 732 (c), because the question is one "dependent upon section 322." That might be a permissible view, though we would be inclined to disagree. Another permissible view in favor of appellate jurisdiction might perhaps be the one adopted by the Eighth Circuit in the *May Seed and Nursery Co.* case (240 F. 2d, at p. 155), to the effect that the issue in this type of case is not one determined "necessarily solely by reason of § 722 of the Code" because the underlying questions are as to "whether § 710 is controlling of

[11] In this connection, it may be noted that the Tax Court itself apparently has been considering such issues as issues arising under Section 722, and has caused them to be reviewed by the Special Division pursuant to Section 732 (d). See R. 36. See also *May Seed and Nursery Co.* v. *Commissioner*, *supra*; *Lockhart Creamery* v. *Commissioner*, *supra*; *Barry-Wehmiller Machinery Co.* v. *Commissioner*, *supra*; *St. Louis Amusement Co.* v. *Commissioner*, *supra*; and *Central Outdoor Advertising Co.* v. *Commissioner*, 22 T. C. 549.

the situation" and "whether the regulations * * * are * * * valid."

Under the circumstances, we have not made a direct challenge to the jurisdiction of this Court, or moved to dismiss for lack of jurisdiction—as we have done in other cases. We have refrained from doing so deliberately, primarily because of a desire on our part to be fair and to avoid the appearance of pressing what might be regarded as a hypertechnical position so as to deprive a litigant unfairly of his opportunity to be heard.

We frankly concede that we do not see the point as one free from doubt, but, while we have not moved to dismiss, we have nevertheless felt constrained to call the problem to the attention of the Court, with nothing more than a suggestion that there is at least a serious doubt as to whether this Court has jurisdiction to review the instant case.

CONCLUSION

For the foregoing reasons, the decision of the Tax Court should be affirmed.

However, there is, as suggested, a question as to the jurisdiction of this Court to review the decision of the Tax Court, and this Court may wish to dismiss for lack of jurisdiction.

Respectfully submitted.

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APPENDIX

Internal Revenue Code of 1939:

Chapter 1—Income Tax

* * * * *

Sec. 322. Refunds and credits.

(a) *Authorization.*—Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(b) *Limitation on Allowance.*

(1) *Period of limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) [as amended by Section 169 (a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Limit on amount of credit or refund.*—The amount of the credit or refund shall not exceed the portion of the tax paid—

(A) If a return was filed by the taxpayer, and the claim was filed within three years from the time the return was filed, during the three years immediately preceding the filing of the claim.

* * * * *

(3) [as added by Section 169 (a) of the Revenue Act of 1942, *supra*] *Exceptions in the case of Waivers.*—If both the Commissioner and the taxpayer have, within the period prescribed in paragraph (1) for the filing of a claim for credit or refund, agreed in writing under the provisions of section 276 (b) to extend beyond the period prescribed in section 275 the time within which the Commissioner may make an assessment, the period within which a claim for credit or refund may be filed, or credit or refund allowed or made if no claim is filed, shall be the period within which the Commissioner may make an assessment pursuant to such agreement or any extension thereof, and six months thereafter, except that the provisions of paragraph (1) shall apply to any claim filed, or credit or refund allowed or made, before the execution of such agreement. * * *

* * * * *

(6) [as added by Section 5 (b) of the Tax Adjustment Act of 1945, c. 340, 59 Stat. 517, and as amended by Section 122 (e) (1) of the Revenue Act of 1945, c. 453, 59 Stat. 556] [12] *Special period of limitation with respect to net operating loss carry-backs and unused excess profits credit carry-backs.*—If the claim for credit or refund relates to an overpayment attributable to a net operating loss carry-back or to an unused excess profits credit carry-back, in lieu of the three-year period of limitation prescribed in paragraph (1), the period shall be that period which ends with the expiration of the fifteenth day of the thirty-ninth month following the end of the taxable year of the net operating loss or the unused excess profits credit which results in such carry-back, or the

[12] By section 5 (f) of the Tax Adjustment Act of 1945, c. 340, 59 Stat. 517, and Section 122 (e) (2) of the Revenue Act of 1945, c. 453, 59 Stat. 556, made applicable with respect to the taxable years beginning after 1940.

period prescribed in paragraph (3) in respect of such taxable year, whichever expires later. In the case of such a claim, the amount of the credit or refund may exceed the portion of the tax paid within the period provided in paragraph (2) or (3), whichever is applicable, to the extent of the amount of the overpayment attributable to such carry-back.

* * * * *

(26 U. S. C. 1952 ed., Sec. 322.)

CHAPTER 2—ADDITIONAL INCOME TAXES

* * * * *

SUBCHAPTER E—EXCESS PROFITS TAX

[As added by Section 201 of the Revenue Act of 1940, c. 757, 54 Stat. 974, which provided that the new subchapter may be cited as the "Excess Profits Tax Act of 1940".]

SEC. 710. IMPOSITION OF TAX.

(a) [as amended by Section 201 of the Second Revenue Act of 1941, c. 412, 55 Stat. 687, and Section 202 of the Revenue Act of 1942, *supra*] *Imposition.*—

(1) *General rule.*—There shall be levied, collected, and paid, for each taxable year, upon the adjusted excess-profits net income, as defined in subsection (b), of every corporation (except a corporation exempt under section 727) a tax equal to whichever is the lesser:

* * * * *

(b) [as amended by Section 2 (a) of the Excess Profits Tax Amendments of 1941, c. 10, 55 Stat. 17, by Section 204 (a) of the Revenue Act of 1942, *supra,* and Section 204 (a) of the Revenue Act of 1943, c. 63, 58 Stat. 21] *Definition of Adjusted Excess Profits Net Income.*—As used in this section, the term "adjusted excess profits net income" in the case of any tax-

able year means the excess profits net income (as defined in section 711) minus the sum of:

(1) *Specific exemption.*—A specific exemption of $10,000; * * *

(2) *Excess profits credit.*—The amount of the excess profits credit allowed under Section 712; and

(3) *Unused excess profits credit.*—The amount of the unused excess profits credit adjustment for the taxable year, computed in accordance with subsection (c).

(c) [as amended by Section 204 (b) of the Revenue Act of 1942, *supra*] *Unused Excess Profits Credit Adjustment.*—

(1) *Computation of unused excess profits credit adjustment.*—The unused excess profits credit adjustment for any taxable year shall be the aggregate of the unused excess profits credit carry-overs and unused excess profits credit carry-backs to such taxable year.

(2) *Definition of unused excess profits credit.*—The term "unused excess profits credit" means the excess, if any, of the excess profits credit for any taxable year beginning after December 31, 1939, over the excess profits net income for such taxable year, computed on the basis of the excess profits credit applicable to such taxable year. * * *

(3) *Amount of unused excess profits credit carry-back and carry-over.*—

(A) *Unused Excess Profits Credit Carry-Back.*—If for any taxable year beginning after December 31, 1941, the taxpayer has an unused excess profits credit, such unused excess profits credit shall be an unused excess profits credit carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such unused excess profits credit over the adjusted excess profits net income for the second preceding taxable year computed for such taxable year (i)

by determining the unused excess profits credit adjustment without regard to such unused excess profits credit, and (ii) without the deduction of the specific exemption provided in subsection (b) (1).

* * * * *

(26 U. S. C. 1952 ed., Sec. 710.)

SEC. 711. EXCESS PROFITS NET INCOME.

(a) *Taxable Years Beginning After December 31, 1939.*—The excess profits net income for any taxable year beginning after December 31, 1939, shall be the normal-tax net income, as defined in section 13 (a) (2), for such year except that the following adjustments shall be made:

(1) *Excess profits credit computed under income credit.*—If the excess profits credit is computed under section 713, the adjustments shall be as follows:

* * * * *

(2) *Excess profits credit computed under invested capital credit.*—If the excess profits credit is computed under section 714, the adjustments shall be as follows:

* * * * *

(26 U. S. C. 1952 ed., Sec. 711.)

SEC. 712 [as amended by Section 13 of the Excess Profits Tax Amendments of 1941, *supra*]. EXCESS PROFITS CREDIT—ALLOWANCE.

(a) *Domestic Corporations.*—In the case of a domestic corporation which was in existence before January 1, 1940, the excess profits credit for any taxable year shall be an amount computed under section 713 or section 714, whichever amount results in the lesser tax under this subchapter for the taxable year for which the tax under this subchapter is being computed. * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 712.)

SEC. 713 [as amended by Section 4 of the Excess Profits Tax Amendments of 1941, *supra,* and Section 288 (e) (2) of the Revenue Act of 1942, *supra*]. EXCESS PROFITS CREDIT—BASED ON INCOME.

(a) *Amount of Excess Profits Credit.*—The excess profits credit for any taxable year, computed under this section, shall be—

(1) *Domestic corporations.*—In the case of a domestic corporation—

(A) 95 per centum of the average base period net income.

* * * * *

(b) *Base Period.*—

(1) *Definition.*—As used in this section the term "base period"—

(A) If the corporation was in existence during the whole of the forty-eight months preceding the beginning of its first taxable year under this subchapter, means the period commencing with the beginning of its first taxable year beginning after December 31, 1935, and ending with the close of its last taxable year beginning before January 1, 1940; and

* * * * *

(26 U. S. C. 1953 ed., Sec. 713.)

SEC. 722 [as amended by Section 222 of the Revenue Act of 1942, *supra,* and the Act of December 17, 1943, c. 346, 57 Stat. 601]. GENERAL RELIEF—CONSTRUCTIVE AVERAGE BASE PERIOD NET INCOME.

(a) *General Rule.*—In any case in which the taxpayer establishes that the tax computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income for the purposes of an excess profits tax based upon a comparison of normal earn-

ings and earnings during an excess profits tax period, the tax shall be determined by using such constructive average base period net income otherwise determined under this subchapter. * * *

(b) *Taxpayers Using Average Earnings Method.*—The tax computed under this subchapter (without the benefit of this section) shall be considered to be excessive and discriminatory in the case of a taxpayer entitled to use the excess profits credit based on income pursuant to section 713, if its average base period net income is an inadequate standard of normal earnings because—

* * * * *

(4) the taxpayer, either during or immediately prior to the base period, commenced business or changed the character of the business and the average base period net income does not reflect the normal operation for the entire base period of the business. * * *

* * * * *

(d) *Application for Relief Under This Section.*—The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section, except as provided in section 710 (a) (5). The benefits of this section shall not be allowed unless the taxpayer within the period of time prescribed by section 322 and subject to the limitation as to amount of credit or refund prescribed in such section makes application therefor in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. If a constructive average base period net income has been determined under the provisions of this section for any taxable year, the Commissioner may, by regulations approved by the Secretary, prescribe the extent to which the limitations prescribed by this subsection may be waived for

the purpose of determining the tax under this subchapter for a subsequent taxable year.

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(26 U. S. C. 1952 ed., Sec. 722.)

SEC. 728. MEANING OF TERMS USED.

The terms used in this subchapter shall have the same meaning as when used in Chapter 1.

(26 U. S. C. 1952 ed., Sec. 728.)

SEC. 729. LAWS APPLICABLE.

(a) *General Rule.*—All provisions of law (including penalties) applicable in respect of the taxes imposed by Chapter 1, shall, insofar as not inconsistent with this subchapter, be applicable in respect of the tax imposed by this subchapter.

* * * * *

(26 U. S. C. 1952 ed., Sec. 729.)

SEC. 732 [as added by Section 9 of the Excess Profits Tax Amendments of 1941, *supra,* and as amended by Section 222 (c) of the Revenue Act of 1942, *supra;* Section 2 of the Joint Resolution of June 30, 1945, c. 211, 59 Stat. 295; and by Section 203 (a) of the Act of December 29, 1945, c. 652, 59 Stat. 669]. REVIEW OF ABNORMALITIES BY THE TAX COURT OF THE UNITED STATES.

(a) *Petition to Tax Court.*—If a claim for refund of tax under this subchapter for any taxable year is disallowed in whole or in part by the Commissioner, and the disallowance relates to the application of section 711 (b) (1) (H), (I), (J), or (K), section 721, or section 722, relating to abnormalities the Commissioner shall send notice of such disallowance to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with the Tax Court for a redetermination of the tax under this sub-

chapter. If such petition is so filed, such notice of disallowance shall be deemed to be a notice of deficiency for all purposes relating to the assessment and collection of taxes or the refund or credit of overpayments.

(b) *Deficiency Found by the Tax Court in Case of Claim.*—If the Tax Court finds that there is no overpayment of tax in respect of any taxable year in respect of which the Commissioner has disallowed, in whole or in part, a claim for refund described in subsection (a) and the Tax Court further finds that there is a deficiency for such year, the Tax Court shall have jurisdiction to determine the amount of such deficiency and such amount shall, when the decision of the Tax Court becomes final, be assessed and shall be paid upon notice and demand from the collector.

(c) *Finality of Determination.*—If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711 (b) (1) (H), (I), (J), or (K), section 721 or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Tax Court.

(d) *Review by Special Division of the Tax Court.*—The determinations and redeterminations by any division of the Tax Court involving any question arising under section 721 (a) (2) (C) or section 722 with respect to any taxable year shall be reviewed by a special division of the Tax Court which shall be constituted by the presiding judge and consist of not less than three judges of the Tax Court. The decisions of such special division shall not be reviewable by the Tax Court, and shall be deemed decisions of the Tax Court.

(26 U. S. C. 1952 ed., Sec. 732.)

Treasury Regulations 112, promulgated under the Internal Revenue Code of 1939, relating to the ex-

cess profits tax for taxable years beginning after December 31, 1941:

SEC. 35.722–5 [as amended by T. D. 5393, 1944 Cum. Bull. 415, and T. D. 5483, 1945 Cum. Bull. 277]. *Application for Relief Under Section 722.*—(a) *Requirements for filing.*—Except as provided in section 710 (a) (5) and section 35.710–5 (relating to deferment of payment of excess profits tax in certain cases under section 722) and except as provided in (d) of this section, the taxpayer is not permitted to claim the benefits of section 722 in computing its excess profits tax, file its excess profits tax return, and pay the tax thus shown on such return without regard to the provisions of section 722. To obtain the benefits of section 722 for any taxable year, the taxpayer must, within the period of time for filing a claim for credit or refund and subject to the limitation as to amount of credit or refund prescribed by section 322 as applicable to the taxable year for which relief is claimed, file under oath an application on Form 991 (revised January 1943) for the benefits of section 722, unless the taxpayer has deferred on its return a portion of its excess profits tax under section 710 (a) (5), or unless the provisions of (d) of this section are applicable to the taxpayer. Generally, an application for relief under section 722 must be filed for an excess profits tax taxable year within three years from the time the excess profits tax return for such year was filed, or within two years from the time the tax for such year was paid, whichever is the later. See section 322 and the regulations thereunder, however, as to the specific rules relating to the period of limitation upon the filing of claims for credit or refund, and the limitations upon the amount of credit or refund.

If an application for relief on Form 991 (prior to its revision in January 1943) for a

taxable year has been filed prior to May 8, 1943, the date of the approval of Treasury Decision 5264, such application shall be considered an application for relief under section 722, but the relief for which such application constitutes a claim shall be restricted to the specific grounds stated in the application. If new grounds in addition to those set forth in such application are relied upon by the taxpayer for relief under section 722, an amendment to the application already filed for such year shall be filed under oath on Form 991 (revised January 1943).

In any case in which the taxpayer claims on its excess profits tax return, in accordance with section 710 (a) (5) and section 35.710–5, the benefit of a tax deferment under section 710 (a) (5), it must attach duplicate copies of its completed application for relief under section 722 on Form 991 (revised January, 1943) to its excess profits tax return on Form 1121. If a taxpayer files an excess profits tax return on which is deducted a tax deferment claimed under section 710 (a) (5) without attaching a completed Form 991 (revised January, 1943) thereto, the taxpayer will not be deemed to have claimed on its return in accordance with section 710 (a) (5) and section 35.710–5 the benefits of section 722. (See section 35.710–5.) (In such case, the amount of tax shown on the return shall be the amount shown by the taxpayer increased by the amount of tax deferment improperly claimed. In order to obtain the benefits of section 722 with respect to the tax thus shown on the return in such a case, the taxpayer must file an application for relief under section 722 on Form 991 (revised January, 1943) within the period of time for filing a claim for credit or refund prescribed by section 322.

Except as otherwise provided in this section, the application on Form 991 (revised January,

1943) must set forth in detail and under oath each ground under section 722 upon which the claim for relief is based, and facts sufficient to apprise the Commissioner of the exact basis thereof. The mere statement of the provision or provisions of law under section 722 upon which the claim for relief is based shall not constitute an application for relief within the meaning of section 722. It is incumbent upon the taxpayer to prepare a true and complete claim and to substantiate it by clear and convincing evidence of all the facts necessary to establish the claim for relief; failure to do so will result in the disallowance of the claim. If a claim for relief is based upon section 722 (b) (5) and section 35.722–3 (e) (relating to factors other than those expressly provided by section 722 (b) (1), (2), (3), and (4) and section 35.722–3 (a), (b), (c), and (d)), the application must state the factors which affect the business of the taxpayer, which may reasonably be considered as resulting in an inadequate standard of normal earnings during the base period, and the reasons why the extension of relief under section 722 to the taxpayer would not be inconsistent with the principles underlying the provisions of section 722 (b) (1), (2), (3), and (4) and section 35.722–3 (a), (b), (c), and (d), and with the conditions and limitations enumerated therein. Only one application for relief under section 722 shall be filed for an excess profits tax taxable year. New grounds or additional facts not contained in the original application shall be presented as an amendment to the original application for the taxable year. Any supplemental or additional applications filed after the filing of the original application shall be considered amendments to the original application previously filed. No new grounds presented by the taxpayer after the period of time for filing a claim for credit or refund prescribed by section 322

and no new grounds or additional facts presented after the disallowance, in whole or in part, of the application for relief and the claim for refund based thereon, will be considered in determining whether the taxpayer is entitled to relief or the amount of the constructive average base period net income to be used in computing such relief for the taxable year.

* * * * *

A separate application on Form 991 (revised January 1943) shall be filed for each taxable year for which relief is claimed under section 722, except as otherwise provided by (d) of this section. If an application for relief (whether under section 722 prior to its amendment by the Revenue Act of 1942 or after such amendment) has been filed for any excess profits tax taxable year prior to the current taxable year for which relief is claimed, the supporting data and information submitted with such earlier application need not be repeated on Form 991 (revised January 1943), filed for the current taxable year provided reference is made to such earlier application as constituting part of Form 991 (revised January 1943), filed for the current taxable year. If the grounds for relief and the amount of the constructive average base period net income claimed for use in computing the excess profits tax for the current taxable year are the same as those contained in an application for relief filed with respect to a prior taxable year, and if a constructive average base period net income has not been determined which under the provisions of (d) of this section may be used by the taxpayer in computing its excess profits tax for the current taxable year for which relief is claimed, only the first page and pertinent lines of Schedule A, Form 991 (revised January 1943), for the current taxable year need be executed under oath provided that the data and information filed with

the application for such prior taxable year are incorporated by reference in the application for the current taxable year. See (d) of this section for requirements with respect to application for the benefits of section 722 where relief has been determined for a prior taxable year.

In order to obtain the benefits of an unused excess profits credit for any taxable year for which an application for relief on Form 991 (revised January 1943) was not filed, using the excess profits credit based on a constructive average base period net income as an unused excess profits credit carry-over or carry-back, the taxpayer, except as otherwise provided in (d) of this section, must file an application on Form 991 (revised January 1943), for the taxable year to which such unused excess profits credit carry-over or carry-back is to be applied within the period of time prescribed by section 322 for the filing of a claim for credit or refund for such latter taxable year. In addition to all other information required, such application shall contain a complete statement of the facts upon which it is based and which existed with respect to the taxable year for which the unused excess profits credit so computed is claimed to have arisen, and shall claim the benefit of the unused excess profits credit carry-over or carry-back. If an application on Form 991 (revised January 1943), for the benefits of section 722 has been filed with respect to any taxable year, or if the filing of such application is unnecessary under (d) of this section, and if the excess profits credit based upon a constructive average base period net income determined for such taxable year produces an unused excess profits credit for such year, to obtain the benefits of such unused excess profits credit as an unused excess profits credit carry-over or carry-back the taxpayer should file an application upon Form 911 (revised January 1943), or an amendment to such application if

already filed, for the taxable year to which such unused excess profits credit carry-over, or carry-back is to be applied.

Such application or amendment should be filed within the period of time prescribed by section 322 for the filing of a claim for credit or refund for the taxable year to which the carry-over or carry-back is to be applied. In addition to all other information required, such application or amendment should incorporate by reference the data and information submitted in support of the application filed for the taxable year for which the unused excess profits credit arose, and in addition should claim the benefit of the unused excess profits credit carry-over or carry-back. If the facts and circumstances which affected the taxpayer during the base period and during the excess profits tax taxable year to which the unused excess profits credit carry-over or carry-back is to be applied are different from those which affected the taxpayer during the base period and during the year for which the unused excess profits credit arose, the determination of the constructive average base period net income to be used in the computation of the unused excess profits credit shall be made in the light of the facts as they existed with respect to the year for which such unused excess profits credit is computed. As to the extent to which the application for relief on Form 991 (revised January 1943), or an amendment thereto, claiming the benefit of an unused excess profits credit carry-over or carry-back constitutes a claim for refund, see (c) of this section.

(c) *Claim for refund.*—The application on Form 991 or Form 991 (revised January 1943) shall be considered a claim for refund or credit with respect to the excess profits tax for the taxable year for which the application is filed which has been paid at or prior to the time such application is filed. The amount of credit

or refund claimed shall be the excess of the amount of excess profits tax for the taxable year paid over the amount of excess profits tax claimed to be payable computed pursuant to the provisions of section 722. In case the taxpayer elects to pay in installments the tax shown upon its return and at the time the application is filed such tax has not been paid in full, the taxpayer should file a claim for refund on Form 843 as promptly as possible after such tax has been paid in full. The information already submitted in the application need not again be submitted on Form 843 if reference is made therein to such application. For limitations upon refunds and credits generally, see section 322. As to procedure upon disallowance of a claim for refund of an excess profits tax which is claimed to be excessive and discriminatory under section 722, see section 732.

* * * * *

(d) *Waiver of limitations for subsequent taxable years.*—The taxpayer shall file an application for relief under section 722 for each taxable year for which such relief is claimed, regardless of whether a constructive average base period net income has been determined with respect to such taxpayer for a prior taxable year. However, if a constructive average base period net income has been finally determined under section 722 (a) with respect to the taxpayer or if permission is granted by the Commissioner after a determination which has not become final, such taxpayer may use the constructive average base period net income so determined, except as further adjustments may be required by section 711 (b), in computing its excess profits credit based on income, its adjusted excess profits net income, and its excess profits tax in any return required to be filed thereafter. * * *

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